

More than local concerns

Local rules and fears are dictating product ingredients worldwide



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Globally active makers and distributors of commercial and consumer products increasingly have to contend with 'chemicals of concern' legislation in a handful of US states and even smaller localities. Ironically, local regulations in the US might be doing more than international treaties, such as the Stockholm Convention, or national and regional laws and regulations, like TSCA and REACH, to force manufacturers of commercial and retail consumer products to address product content issues.

State and local chemical laws in the US differ between jurisdictions. Tracking and adapting to them presents a challenge for entities that use chemical substances to manufacture products that are marketed in numerous jurisdictions, even those who do not manufacture in the US. This new burden is emerging at a time when US retailers are establishing and imposing increasingly complex standards for product manufacturers.

Emerging legal landscape

At the federal level in the US, chemical substances are primarily regulated by

TSCA. The Environmental Protection Agency (EPA), however, did not aggressively or effectively implement the statute, so efforts began nearly one decade ago to update it. This culminated in the sweeping amendments of June 2016 that were called the Frank R Lautenberg Chemical Safety for the 21st Century Act, in honour of the late senator's long-running efforts to amend TSCA.

However, the legislative process was slow and uncertain. In the preceding decade, sporadic activity in Congress and activism by environmental and consumer interest groups had created a growing awareness of the potential presence of undesirable chemicals in products.

Several widely reported news stories concerning detection of lead in children's toys had focused public concern on the issue. This prompted congressional action in the form of the 2008 amendments to the Consumer Product Safety Act (CPSA), which set new standards for lead in children's products generally and for certain phthalates in children's toys.

The 2008 presidential election, and President Obama's and the EPA administrator's commitment to enhancing chemical safety, enthused environmental and consumer interest groups. As

legislative efforts to amend TSCA languished and frustration grew, like-minded interest groups and activists in state legislatures increasingly began to collaborate. A handful of environmentally minded states created clearing houses for sharing information, including lists of specific chemical substances of concern.

Many of those states were keenly aware that the state of California (pursuant to Proposition 65) had already assembled a list of carcinogens and reproductive toxins, which is regularly updated through an administrative process. However, this only prompts warnings of potential hazards from exposures and does not generally impose quantitative limits on, or prohibit the presence of, a listed chemical in a commercial or consumer product.

Those states also began to develop and share their proposals for legislation, in particular seeking to regulate or prohibit products that contain certain identified substances. The states' lists of chemicals of concern led quite quickly to legislation to control them.

Perhaps adding fuel to the fire was the enormous attention given, during the final negotiations of the amended TSCA, to the appropriate terms for federal preemption of state actions seeking to regulate

chemicals. Arguably, that discussion served to increase consumer activists' and environmental groups' determination to call upon state legislatures to act.

International impact

State legislation to regulate chemical substances has generally fallen into two categories:

- » those laws banning the use of a chemical substance in a particular product or category of products; and
- » those authorising a state regulatory agency to create a list of 'priority chemicals', based on the state's assessment of their potential risk to human health and the environment.

While the former can create headaches for manufacturers and distributors of products targeted by such legislation - such as prohibitions on certain flame retardants in mattresses - the latter can create more compliance concerns for the industry as a whole.

Priority chemicals legislation often requires manufacturers of products incorporating listed chemicals to notify the state of their presence in their products. Whether the substances will be released from a product and the likelihood of exposure do not have to be considered.

In certain states, such notification can trigger a requirement for the manufacturer to conduct an 'alternatives assessment' to determine whether another substance - presumably presenting fewer potential environmental and/or health concerns - could be substituted. Furthermore, some state regulatory agencies can add to state lists, potentially making the requirements even more difficult for overseas manufacturers to monitor.

To confound things further, several local jurisdictions in the US have begun to develop their own regulations. For example, in 2015, Albany County, New York, passed the Toxic Free Toys Act. This authorised the promulgation of regulations prohibiting the presence of certain chemical substances, including lead, cadmium and arsenic, over certain levels in surface coating and accessible substrate materials on children's products.

Only following [litigation](#) by The Toy Association and other stakeholders, were the requirements amended to align with

the relevant federal standards. The [amended regulations](#) went into effect on 1 November. This Act and similar requirements proffered by other localities in the state of New York, demonstrate how stakeholders need to keep up with developments in chemicals regulation, even at local level.

Emerging local trends

In recent years, chemicals legislation introduced at state and local level has often focused on consumer products, and, even more specifically, on children's products. For example, proposed Massachusetts State Senate Bill (SB) 1175 prohibits the sale, offer or manufacture, distribution or importation of children's products containing antimony trioxide, hexabromocyclododecane or numerous other substances in concentrations greater than 1,000ppm for any component of the product.

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Additionally, New York State is considering Assembly Bill (AB) 7950, which would require the Departments of State, Environmental Conservation and Health to regulate "chemicals of high concern to children". These are defined extremely broadly, as "any chemical that has been identified by a state, federal or international governmental entity on the basis of credible scientific evidence or reliable information" as:

- » a carcinogen, reproductive or developmental toxicant, endocrine disruptor or asthmagen;
- » persistent, bioaccumulative and toxic; or
- » very persistent and very bioaccumulative.

Manufacturers would be required to report to that department if they make any children's product containing a chemical of high concern to children. The department

would maintain a list of such products and manufacturers would be required to inform retailers when a children's product contains those chemicals.

Major US retailers, such as Walmart, are already pressing for the elimination of certain chemicals in products. If states eventually develop their own lists or a single state has an especially expansive list of chemicals of concern (Washington just increased its from 66 to 85 substances), retailers will soon take them up. A national distributor in the US can ill afford to take on the risk of selling a product throughout its channels that might contain a chemical that is unlawful, or identified as a risk to children or other users, in even a single state.

California's role

Of all of the state and local jurisdictions in the US, California has developed the most comprehensive set of requirements concerning chemical substances and their presence in commercial and consumer products. This is of great interest to manufacturers and distributors, given the size of the market there.

The California Safer Consumer Products Regulations (SCPR) went into effect in October 2013. They require manufacturers to explore whether they can substitute the chemicals of concern they currently use in specific consumer products (defined as 'priority products') with chemicals that present a lower potential risk to public health and the environment.

The first priority product regulation went into effect in July, requiring manufacturers of children's foam-padded sleeping products containing tris (1,3-dichloro-2-propyl) phosphate (TDCPP) or tris (2-chloroethyl) phosphate (TCEP) to notify the California Department of Toxic Substances Control (DTSC) that they manufacture these products, and subsequently to prepare an alternatives analysis. The DTSC has also identified a number of product categories from which it will choose additional priority products (see below).

International relevance

Manufacturers and marketers of commercial and consumer products that are distributed internationally have no choice but to keep informed about state and local legislation relating to chemicals,

because they are subject to such legislation even if they do not manufacture their products in the US.

For example, Massachusetts SB 1175 specifically covers manufacturers of children's products, as well as entities that offer products for sale "through any means including, but not limited to, remote offerings". Similarly, the proposed New York legislation targeting chemicals of concern to children affects manufacturers, distributors, retailers and importers of children's products for sale there.

California's first priority products regulation covers "any person who manufactures a product" that is subject to the regulation, or "any person that controls the manufacturing process for, or specifies the use of chemicals to be included in, the product". Therefore, even designers who specify the use of TCDPP or TCEP in mattresses to comply with fire safety ordinances in other states or elsewhere in the world might become subject to these regulations.

Moreover, while this programme currently only covers children's foam-padded sleeping products, it is intended to, and probably will, expand to numerous others.

The initial priority products list already also includes spray polyurethane foam with unreacted methylene diphenyl diisocyanates (MDI) and paint strippers containing methylene chloride (MeCl₂); this latter category of product is also the subject of a proposed TSCA section 6(a) rule that would prohibit consumer-use MeCl₂ containing paint strippers.

As part of its 2015-17 priority products workplan, the DTSC has identified seven categories from which it intends to choose the next products, including beauty, personal care and hygiene products, household and office furnishings, and clothing. US retailers have no choice but to try to anticipate and perhaps begin to phase out or ultimately deselect products that are within the scope of California's chemical safety and priority products designations.

The state is currently seeking suggestions from the public on categories of products to include for the 2018-2020 workplan. Environmental and consumer interest groups are active participants in the nomination process.



Photo: www.karristock.com

Childrens' foam mattresses have been the focus of recent product-specific legislation

Actions may ramp up

Despite the bipartisan nature of the 2016 TSCA amendments, the final language concerning federal preemption of state and federal laws fell far short of what would be needed to enable makers of internationally distributed products to assume there will be uniform standards in the US market. As noted above, the debate over preemption heightened the sensitivities of consumer activists and these concerns were exacerbated by the outcome of the 2016 presidential election.

The EPA's actions to date, as well as its recently issued spring 2017 regulatory agenda (which reported that the agency intends to finalise the three TSCA section 6(a) regulations proposed in the final days of the Obama administration), have done little to relieve this uncertainty.

Indeed, environmental groups swiftly challenged each of the regulations the EPA was required to issue under the amended statute to provide a framework for how the agency will proceed when identifying chemicals of concern and evaluating the risks they may present.

State and local governments are also likely to remain wary of the Trump administration taking a less vigorous

approach to regulating chemical substances under the June 2016 TSCA amendments than they would prefer. This is likely to be the basis for intensifying their efforts to regulate chemical substances in products. For instance, California is considering SB 49, a law that would require the state to continue to enforce Obama-era air and water standards, among others, regardless of how such standards change at federal level.

We have entered an era where, ironically, major players on a global stage, which make countless products that are marketed internationally, now find they need to worry equally about standards set by international treaties and national regulatory agencies as the ordinances and regulations that are issued by some of the smallest of states and local jurisdictions in the US that are striving to control the chemical content of commercial and consumer-use products.

This article was written with assistance from Camille Heyboer, who also works in the environmental practice group at Arnold & Porter Kaye Scholer. The views expressed in it are those of the expert authors and are not necessarily shared by Chemical Watch.